

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUSSEX COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2019-041

PBA LOCAL 378A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for a restraint of binding arbitration of the PBA's grievance contesting the transfer of an officer from her administrative post to a building post without permitting her to choose her shift or days off by seniority. Finding that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised, and that the County did not demonstrate a need for special skills, qualifications, or training or supervisory objectives for deviating from an alleged seniority shift and days off selection process when it reassigned the grievant to a midnight shift, the Commission declines to restrain arbitration.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Trimboli & Prusinowski, LLC,  
attorneys (James T. Prusinowski, of counsel; Debra  
Shannon, of counsel and on the brief)

For the Respondent, Mets Schiro & McGovern, LLP,  
attorneys (James M. Mets, of counsel, Brian J. Manetta,  
of counsel and on the brief)

DECISION

On January 16, 2019, the Sussex County Sheriff's Office (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 378A (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it transferred the grievant from her administrative post in the Classification Unit to a Tier Sergeant building post without permitting her to choose her shift or her days off by seniority.

The County has filed briefs, exhibits, and the certifications of its Undersheriff, John Tomasula, and its attorney, Debra Shannon, Esq. The PBA filed briefs, exhibits,

and the certifications of Sergeant David Hameier and the grievant. These facts appear.

The PBA represents all Corrections Officers employed by the County, including County Corrections Officers, Sergeants, Lieutenants, and Captains but excluding all other employees employed by the County. The County and PBA are parties to a CNA in effect from January 1, 2014 to December 31, 2016. The grievance procedure ends in binding arbitration.

Article 2 of the CNA entitled "Seniority," provides in pertinent part:

#### Section 2

For all other purposes, including shift transfers, assignments to regular days off (RDO), and special programs, seniority is defined as time in grade (date of appointment in current title) in the County's Correctional Facility. An employee who is leaving a unit and returning to a "building post" shall be assigned to a shift and RDO's by seniority as defined in this agreement.

#### Section 3

Seniority will be one of several criteria used by management when making personnel assignments. Other criteria to be used include employee preferences, possession of necessary or desired skills, expertise, gender (where a bona fide occupational qualification) specialized training, experience, proven capability, attendance, and need for cross-training, among others. Where all other qualifications are equal, seniority shall be determinative. Prior to making personnel assignment to a unit, the availability of the position shall be put out on a signature sheet which shows the

assignment title (excluding exigent circumstances). Under exigent circumstances, a position in a unit may be filled temporarily by Management Prerogative. If the position becomes full time, a sign-up sheet shall be circulated to fill that position. The assignment to a program or administrative position shall be done in accordance with Article 2 Section 3 and Article 8 of this agreement.

#### Section 6

Regular Days Off (RDO's) - No officer or Supervisor, regardless of status, shall be assigned split RDO's. All RDOs shall be consecutive, unless mutually agreed upon by the Employer and the employee. RDO's shall be assigned exclusively by seniority. RDO assignments shall not be subject to bumping. RDO's within special programs (i.e., SLAP, SWAP, Classifications, and Training) will be assigned by seniority of the Officers within the program in accordance with Article 2, Section 2 of the Agreement.

Article 5 of the CNA, entitled "Association Representatives," states:

The Association shall have the right to designate such members of the Association as it deems reasonably necessary as Association Representatives, who shall not be discriminated against due to their legitimate Association activity.

Article 28 of the CNA, entitled "Discrimination," states:

No employee shall be discharged or discriminated against because of age, race, creed, sex, color, national origin, ancestry, handicap, affectional or sexual orientation, or association affiliation. The Employer reserves the right to discipline or discharge any employee for just cause.

The grievant is employed as a corrections sergeant by the County. She was hired in April 2001 as a corrections officer and promoted to sergeant in April 2011. She is the County's third most senior sergeant. She is the only female sergeant employed at the Bureau of Corrections and is the President of PBA Local 378A. Tomasula is an Undersheriff for the County and has had responsibility for administrative oversight of the Sussex County Jail since March 1, 2018. There are currently ten sergeants employed in the County's Bureau of Corrections. Most sergeants are assigned to work the jail's building posts, or "tiers," in one of the following shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; or 11 p.m. to 7 a.m. (the "midnight shift"). Additionally, one sergeant is assigned to the Training Unit, one sergeant is assigned to the Maintenance Unit, and, prior to January 1, 2019, a sergeant was assigned to the Classifications Unit.

All sergeants assigned to building posts perform the same duties. The main duties of a Tier Sergeant are to supervise the Corrections Officers that work on the shift, perform routine checks of tiers, and perform between one and three post checks on every post throughout the shift. In addition, Tier Sergeants attend roll call, make sure that all corrections officers have all of their equipment and that the equipment is in good working order and that their uniforms are proper and presentable. Tier Sergeants are also required to ensure that no keys are missing

from the Sergeants Key Box and ensure that all paperwork is completed properly and that log entries are complete. All sergeants are qualified to work as Tier Sergeants and the duties of Tier Sergeant are the same on each shift.

The grievant was previously a Tier Sergeant on the midnight shift, but was reassigned to the Classifications Unit in January 2017. The grievant's duties in Classifications included determining inmate housing assignments, handling court paperwork, performing warrant searches for inmates scheduled for release, and keeping records of inmate discipline. She initially worked in Classifications from 7 a.m. to 1 p.m. while continuing to work as a Tier Sergeant from 5 a.m. to 7 a.m. at the start of her shift. Then, for the majority of her time in Classifications, the grievant worked the 8 a.m. to 4 p.m. shift to be consistent with the court day.

In or about April or May of 2018, the jail's Lieutenant shared his concerns with Tomasula about the Tier Sergeant vacancy on the midnight shift, specifically that scheduling leave time had become a hardship, as well as handling day to day issues that arose on the shift due to missing one sergeant. In July 2018, the PBA President also shared some concerns with Tomasula regarding safety and security, including on the vacant midnight shift. On September 19, 2018, Tomasula sent a memorandum to all sergeants soliciting their interest in switching from their

current assignments to work the Tier Sergeant midnight shift. The memorandum stated that all Tier Sergeant positions would be filled beginning January 1, 2019. On September 30, 2018, a sergeant asked to be considered for the midnight shift, but on October 12 he withdrew the request. The grievant did not volunteer for a Tier Sergeant shift.

On or about October 24, 2018, Tomasula verbally informed the grievant that effective January 1, 2019, she would be removed from Classifications and returned to a building post as a Tier Sergeant on the midnight shift. Tomasula certifies that he made the decision to move the grievant to the vacant shift because she could be easily removed from her administrative post because the Classifications Officer does not need to be supervisory and he had two other qualified employees who could serve in that role. He certifies that the two remaining administrative sergeants would have been more difficult to move because one is a Training Sergeant who is a firearms instructor, armorer and FTO Supervisor, while the other is a Maintenance Officer who has developed strong working relationships with vendors, knows the mechanical workings of the facility, and can make repairs.

On December 3, 2018, Tomasula issued a PowerDMS message memorializing his verbal communication that the grievant would be returning to a building post as a Tier Sergeant. The grievant certifies that she was not given an opportunity to select a shift

by seniority, and that she would have chosen the 7 a.m. to 3 p.m. shift. She certifies that there are sergeants with less seniority than her working that shift. The grievant also certifies that she was not permitted to select her regular days off (RDOs) by seniority. On January 6, 2019, the grievant began her Tier Sergeant assignment on the midnight shift.

Hameier certifies that he is the County's second-most senior sergeant and currently works the 11:00 p.m. to 7:00 a.m. shift as building post Tier Sergeant. He certifies that all sergeants are qualified to work as Tier Sergeants and the duties of Tier Sergeant are the same on each shift. Upon learning that the grievant was returning to a building post as a Tier Sergeant on his shift, he voluntarily switched his RDOs with her so that she could maintain the days off she had chosen while she was in the Classifications Unit. Tomasula certifies that with her shift change, the grievant was advised that she would keep her selected and existing RDO after the transfer, but his November 23, 2018 letter to the grievant confirms that this was because "Sgt. Hameier has voluntarily agreed to adjust his RDO's so that you can retain Monday and Tuesday as your RDO's."

On November 7, 2018, the PBA filed a grievance alleging that the County violated Article 2 of the CNA by refusing to allow the grievant to select a Tier Sergeant shift by seniority and to select RDOs by seniority. The grievance also alleges that the



County violated Articles 5 and 28 by discriminating against her for union activity and on the basis of sex. The County denied the grievance at every step. On January 2, 2019, the PBA requested binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State

Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The County asserts that not only was the decision to transfer the grievant from Classifications back to a building post within its managerial prerogative, but that the County

properly exercised its managerial prerogative in transferring the grievant to fill the Tier Sergeant vacancy on the midnight shift and not permit her to bid on her preferred Tier Sergeant shift or for RDOs. It argues that the CNA does not allow for bumping for shifts or for RDOs, and that this was an involuntary assignment to a vacant position on shift, not a selection for transfer based upon qualifications with seniority as a tie-breaker. The County further contends that because the grievant was ultimately allowed to maintain her previously selected RDOs, there is no remedy for that part of the grievance and the issue is moot. Finally, the County asserts that the grievant has not substantiated her discrimination claims and that those claims are more appropriate for another forum.

The PBA asserts that the grievance is arbitrable because it concerns seniority-based shift selection, and seniority-based requests for time off. It argues that this case does not infringe on the County's managerial prerogatives because the grievance does not challenge the County's transfer of the grievant from Classifications to a building post, but challenges the unilateral placement of the grievant on the midnight shift in violation of Article 2 of the CNA, despite less senior sergeants working on the grievant's preferred building post shift. The PBA contends that Tier Sergeants perform identical functions regardless of what shift they work, and that the County cannot

and has not asserted that the grievant has any special skills or qualifications that require her to work the midnight shift. It further asserts that the grievant's claim concerning RDOs is not moot because that is a question of contract interpretation for the arbitrator. Finally, the PBA asserts that the Commission has held that claims of discrimination based on a protected class and based on anti-union animus are arbitrable as long as the underlying personnel actions are arbitrable.

Public employers and unions may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised.

Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), clarified, P.E.R.C. No. 2000-72, 26 NJPER 172 (¶31069 2000), aff'd, 27 NJPER 357 (¶32128 App. Div. 2001); City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd, NJPER Supp.2d 245 (¶204 App. Div. 1990). However,

"seniority bidding cannot compromise management's power to assign employees with special qualifications to special tasks, determine that employees with certain abilities perform better on certain shifts, train employees, strengthen supervision, determine staffing levels, or respond to emergencies." Hoboken at 394.

"The interplay between seniority as a basis for choosing shift assignments and managerial needs as a basis for exceptions to any

agreed-upon seniority system must be assessed case-by-case" focusing on "the specific nature of an arbitration dispute given the facts contained in the record and the arguments presented." Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19, 20 (¶30006 1998); see also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

The Commission has therefore declined to restrain arbitration of grievances alleging deviation from seniority shift and post bidding systems where the public employer has failed to demonstrate a need for special skills, qualifications, or specific training or supervisory objectives and has not otherwise shown how governmental policy would be significantly impeded. See, e.g., Hudson Cty., P.E.R.C. No. 2019-24, 45 NJPER 219 (¶58 2018) (reassignment from seniority bidded post and shift to Record Room post on different schedule was arbitrable); City of Trenton, P.E.R.C. No. 2014-18, 40 NJPER 202 (¶77 2013) (schedule change and reassignment from administration unit to operations unit was arbitrable); Bedminster Tp., P.E.R.C. No. 2013-94, 40 NJPER 72 (¶28 2013) (reassignment of senior officer from day shift to afternoon/night shift was arbitrable); Burlington Cty., P.E.R.C. No. 2012-27, 38 NJPER 211 (¶73 2012) (senior officers reassigned from closed Money Room post could arbitrate over seniority bidding for Control 9 posts); City of Newark, P.E.R.C. No. 2005-45, 30 NJPER 510 (¶174 2004) (firefighter returning from

sick leave could arbitrate reassignment to different post and schedule, and change in vacation seniority); Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998) (officers who chose airport posts based on seniority but were replaced by junior officers could arbitrate their reassignments); City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989) (assignment of captain's shift not based on seniority was arbitrable).

Similarly, the Commission has held that seniority-based selection of RDO is mandatorily negotiable where it does not substantially limit governmental policymaking powers. Somerset Cty. Sheriff, P.E.R.C. No. 2000-20, 25 NJPER 419 (¶30182 1999), recon. den., P.E.R.C. No. 2000-38, 26 NJPER 16 (¶31003 1999), aff'd, 27 NJPER 356 (¶32127 App. Div. 2001) (female corrections officers could arbitrate denial of shift and RDO selections, as long as County retained statutory right to at least one female officer on each shift; managerial preference for more female officers per shift could be accomplished through overtime rather than denying female officer preferences for shifts and RDOs that less senior male officers were permitted to choose).

In City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990), the employer reassigned a police lieutenant from the investigative bureau to the patrol division because there was a vacancy for a Tour Commander in the patrol division, and the new captain was going to take over investigative bureau

responsibilities that the lieutenant had performed. The lieutenant grieved both the transfer to the patrol division and the denial of his seniority-based shift preference once transferred to the patrol division. The Commission restrained arbitration over the transfer from investigative to patrol, finding that the employer had the managerial prerogative to reorganize police services and redeploy its supervisory police personnel. But the Commission declined to restrain arbitration over the lieutenant's shift selection in his new patrol division post, finding:

On the other hand, that aspect of the grievance which asserts that Gervato had greater seniority than Amos and should have been given a shift selection preference is arbitrable. See City of Hoboken, P.E.R.C. No. 89-95, 15 NJPER 253 (¶20103 1989); City of Newark, P.E.R.C. No. 88-106, 14 NJPER 336 (¶19126 1988). Gervato and Amos have the same rank and assignments. No showing has been alleged or made that Gervato is particularly suited to the midnight shift and that Amos is particularly suited to the day shift. As we did in Hoboken, we hold permissively negotiable a provision requiring an employer to observe seniority among qualified officers in making a shift assignment absent any need to fill a position with a specially skilled or experienced officer.

[Garfield, 16 NJPER at 320.]

In the instant case, the PBA does not seek to arbitrate the transfer of the grievant from Classifications to a building post, so it has already conceded the managerial prerogative to redeploy

supervisory personnel that was implicated in the partial restraint of arbitration in Garfield. However, the remaining issue of seniority shift and RDO selection once a reassignment is made is analogous to the arbitrable part of Garfield. As in Garfield, although there was a need to fill a vacancy on the midnight shift, there was no compelling reason demonstrated by the employer for preventing the more senior transferred officer from selecting a different shift while having the junior officer from the selected shift cover the midnight shift.

Here, the County has not suggested that special skills, qualifications, operational problems, training objectives, supervisory issues, or any other managerial reason prompted its assignment of the grievant to the midnight Tier Sergeant shift in alleged violation of the CNA's seniority shift bidding clauses. Its assertion that the contract does not allow the grievant to select her shift or RDO by seniority after an involuntary transfer to bump a junior officer out of a shift or RDO is a contractual defense for the arbitrator. Ridgefield Park. Absent articulation of a particularized governmental policy objective that would be significantly impeded by adherence to an alleged seniority shift bidding system and RDO selection process, the PBA may seek to enforce the claim through binding arbitration.

Next, we decline to consider the County's assertion that the grievant's claim as it pertains to RDO selection is moot because



another unit member volunteered to switch his RDOs with her.

"Whether the grievance is moot is a question for the arbitrator and outside our limited scope of negotiations jurisdiction."

Clinton Tp. Bd. of Ed., P.E.R.C. No. 2008-19, 33 NJPER 242 (¶93 2007); see also Paterson State Oper. School Dist, P.E.R.C. No. 2001-47, 27 NJPER 126 (¶32047 2001); City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34 (¶32017 2000).

Finally, we reject the County's assertions that the PBA may not arbitrate alleged violations of the CNA's discrimination clauses. Anti-union discrimination claims generally arise in an unfair practice context. Although the Commission cannot exercise its unfair practice jurisdiction in the context of a scope of negotiations petition, "[A] dispute that is legally arbitrable does not become non-arbitrable simply because it also involves an allegation of anti-union discrimination." Plainsboro Tp., P.E.R.C. No. 2009-42, 35 NJPER 42 (¶18 2009); see also Ringwood Bor., P.E.R.C. No. 2002-29, 28 NJPER 52 (¶33016 2001) ("the PBA is not required to litigate as an unfair practice its otherwise arbitrable claim" concerning mandatorily negotiable union leave); Teaneck Tp., P.E.R.C. No. 2002-20, 28 NJPER 15 (¶33003 2001) (arbitrator's jurisdiction to hear the contractual merits of otherwise negotiable disputes was not displaced because our unfair practice jurisdiction could be invoked to review an aspect

of those claims); and Manville Bd. of Ed., P.E.R.C. No. 94-58, 19 NJPER 605 (¶24288 1993).

Nor is the PBA precluded from arbitrating an alleged violation of a CNA clause prohibiting discrimination on the basis of sex. Under Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983), binding arbitration is barred only where a grievance claims that a managerial decision was tainted by discrimination. The Commission and courts have held that unions may utilize binding arbitration to enforce contractual discrimination claims so long as they do not challenge a managerial prerogative. New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185, 202 (1996), citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination); New Jersey Transit Corp., P.E.R.C. No. 2006-90, 32 NJPER 171 (¶77 2006); Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-68, 30 NJPER 135 (¶53 2004) ("Unlike Teaneck, this case involves a negotiable term and condition of employment"); cf. Thornton v. Potamkin Chevrolet, 94 N.J. 1 (1983) (neither failure to present nor unsuccessful submission of discrimination claim to arbitration will foreclose an employee's statutory right to present the claim to DCR). Thus, having held above that this case involves negotiable issues of seniority-based shift and

schedule bidding that do not significantly interfere with managerial prerogatives, we will not restrain arbitration over alleged violations of contractual anti-discrimination clauses.

ORDER

The request of the Sussex County Sheriff's Office for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni and Papero recused themselves.

ISSUED: June 27, 2019

Trenton, New Jersey